NO. 50166-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

RAUL LOPEZ-RAMOS,

Respondent.

APPELLANT'S OPENING BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Appellant

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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1. The State assigns error to Finding of Fact number six as there was not substantial evidence to support this finding.
2. The trial court erred in entering conclusion of law number two.
3. The trial court erred in entering conclusion of law number three.
4. The trial court erred in granting Lopes-Ramos' motion to suppress based on a finding that there was not probable cause to arrest him for driving under the influence.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court have substantial evidence to support its findings of fact?
2. Did the trial court err in finding that there was not probable cause to arrest Lopez-Ramos for driving under the influence?

III. STATEMENT OF THE CASE

Officer Derek Kelley is an officer with the City of Woodland and has been trained as a Drug Recognition Expert. RP 13. On September 3, 2016, he was finishing up a traffic stop when he observed a silver car pull up next to a closed business. RP 14. He decided to make a social contact to determine why the person was stopping at a closed business. The driver of the vehicle, Raul Lopez-Ramos, rolled down the window; when he did, Officer Kelley noticed a strong odor of alcohol coming from the vehicle. RP 15. The officer also noticed that Lopez-Ramos' eyes were watery and bloodshot, his speech sounded slurred, and there were open alcohol containers in the car. RP 15. The open containers were partially full and

had condensation on the outside of the bottles, indicating they were still cold. RP 18.

Officer Kelley asked Lopez-Ramos to get out of the vehicle to investigate a possible DUI and in order to separate Lopez-Ramos from the passenger. RP 16. Once outside, Officer Kelley noticed a strong and obvious odor of intoxicants emanating from Lopez-Ramos' mouth. RP 16. Lopez-Ramos stated he had had one beer. RP 16. Officer Kelley attempted to do field sobriety tests with Lopez-Ramos but was unable to. The officer was not sure whether Lopez-Ramos' inability to do the tests was because of the language barrier or because of impairment. RP 16–17. A portable breath test was offered and taken, but Officer Kelley did not comply with the applicable WACs because of the language barrier. RP 17. Officer Kelley testified, "Once I was done with the PBT I determined that [Lopez-Ramos] was, in fact, impaired and under the influence of alcohol." RP 18.

Lopez-Ramos brought a motion to suppress in the trial court, arguing that Officer Kelley did not have probable cause to arrest him for DUI. CP 15. The court granted the motion, suppressing all evidence stemming from the arrest of the defendant. RP 28, CP 21. The State timely appealed the decision and is now respectfully requesting that this Court reverse the decision of the trial court.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appellate Court reviews a trial court's findings of fact in a suppression hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). Questions of law are reviewed de novo. *Id.* Therefore, the questions at issue are whether substantial evidence supported Finding of Fact number six, and whether there was probable cause to arrest Lopez-Ramos for DUI.

B. THE TRIAL COURT ERRED IN MAKING FINDING OF FACT NUMBER SIX, AS THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THESE FINDINGS.

A court's finding of fact must be supported by substantial evidence. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). Finding of Fact number six states, "Officer Kelley testified that after the PBT, he was able to determine that Mr. Lopez-Ramos was impaired." CP 22. In fact, Officer Kelley testified "Once I was done with the PBT I determined that he was, in fact, impaired

and under the influence of alcohol." RP 17–18. While this is a small difference, the language of Finding of Fact number six implies that the PBT was necessary to Officer Kelley's finding of probable cause, while the testimony indicates merely a progression in time. The testimony leaves open the possibility that probable cause could have been found even in absence of the portable breath test. Because the testimony was not accurately reflected in the Findings of Fact, there was not substantial evidence to support Finding number Six.

C. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NOT PROBABLE CAUSE TO ARREST LOPEZ-RAMOS AND GRANTING HIS MOTION TO SUPPRESS.

As a general rule an officer must have probable cause to arrest a person for committing a crime. The officer need not have facts sufficient to establish guilt beyond a reasonable doubt, but must reasonably believe that the person to be arrested has committed a crime. *State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539, 543 (2002); *State v. Griffith*, 61 Wn. App. 35, 39, 808 P.2d 1171 (1991); *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999).

Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *O'Neill*

v. Department of Licensing, 62 Wn. App. 112, 116–17, 813 P.2d 166 (1991); *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). The court must review probable cause based on the totality of the facts and circumstances within the officer's knowledge at the time of the arrest. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause is to be viewed in a practical and non-technical manner. *State v. Herzog*, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). Additionally, probable cause is not negated merely because "it is possible to imagine an innocent explanation for observed activities." *Graham*, 130 Wn.2d at 725.

Furthermore, an officer is not required to witness erratic driving in making a probable cause determination, as erratic driving is not an element of Driving under the Influence. *State v. Hansen*, 15 Wn. App. 95, 96, 546 P.2d 1242 (1976). In fact, the officer need not see the suspect driving the vehicle at all to find probable cause that a person is driving under the influence. *State v. Wilhelm*, 78 Wn. App. 188, 896 P.2d 105 (1995).

Finally, the State concedes that the portable breath test was not properly admitted and cannot be considered. However, there is still probable cause. For example, Division Three of the Washington Court of Appeals held in one case that the PBT could not be used to determine whether the officer had probable cause, but went on to find that probable cause existed even without the PBT. *Bokor v. Department of Licensing*, 74

Wn. App. 523, 874 P.2d 168 (1994). Therefore, a court can find probable cause even without a PBT.

In *Gillenwater*, Division Two of the Washington Court of Appeals found that probable cause was established based on the trooper's knowledge of a cooler full of beer in the car, three opened cans of beer in the car, and the odor of alcohol on Gillenwater and his deceased passenger. 96 Wn. App. at 671. The Court stated, "Although these facts do not prove beyond a reasonable doubt that Gillenwater had consumed enough alcohol to affect his driving, they do raise 'a reasonable ground of suspicion...to warrant a cautious man in believing...' him to be guilty." *Id.*

In *State v. Cerrillo*, the officer saw a pickup parked near a restaurant with two men asleep inside. 122 Wn. App. 341, 345, 93 P.3d 960 (2004). The officer contacted the driver of the vehicle, Cerrillo, and during their interaction he determined that Cerrillo was intoxicated. The officer told Cerrillo to "sleep it off" and not to drive. A short time later, the officer saw the pickup leaving the parking lot a followed it. *Id.* The driver failed to use his turn signal twice, and the officer stopped the pickup. Cerrillo was the driver, and he was arrested for DUI. *Id.* The Court of Appeals upheld the arrest, stating, "A reasonable person would agree with Officer Sands that the smell of alcohol emanating from Mr. Cerrillo during the first encounter indicated that Mr. Cerrillo likely was under the influence of alcohol." *Id.* at

351. The main factor that the Court looked at was the odor of intoxicants emanating from the defendant.

In this case, the totality of the circumstances gave Officer Kelley probable cause that Lopez-Ramos was driving under the influence. Officer Kelley observed that Lopez-Ramos' coordination was fair, his speech was slurred, his face was flushed, and his eyes were bloodshot and watery. He also had the "strong and obvious" odor of intoxicants on his breath, there were open containers in the vehicle, and Lopes-Ramos admitted to drinking alcohol. These are all signs of impairment. The fact that there could be an innocent explanation for Officer Kelley's observations does not negate probable cause. Officer Kelley is a trained Drug Recognition Expert who has many years of training and experience in DUI detection and investigation. His conclusion was that Lopez-Ramos was under the influence. However, any reasonably cautious individual would have seen the same signs of impairment – slurred speech, affected coordination, et cetera – and came to the same conclusion. Like in the *Gillenwater* case, the facts here raise a reasonable ground of suspicion to warrant a cautious man in believing that Lopez-Ramos was driving under the influence.

V. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the decision of the trial court which granted the motion to suppress

based upon a ruling that there was not probable cause to arrest the defendant for driving under the influence. The State requests this Court remand this case back to the trial court for trial.

Respectfully submitted this 8th day of August, 2017.

RYAN JURVAKAINEN
Prosecuting Attorney

By: _____

Aila R. Wallace, WSBA #46898
Deputy Prosecuting Attorney
Representing Appellant

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Marie Jean Trombley
P.O. Box 829
Graham, WA 98338-0829

marietrombley@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 24th, 2017.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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